No. 38

# In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

*v.*

PETER BROWN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of New York (R. 13) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 16-18) is reported at 209 F. 2d 463.

### JURISDICTION

The judgment of the court of appeals was entered on January 5, 1954 (R. 18). The petition for a writ of certiorari was filed on March 24, 1954, and was

granted on April 26, 1954 (R. 19). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Federal Tort Claims Act, 28 U.S.C. 1346 (b), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Section 31 of the Act of March 28, 1934, 48 Stat. 526, 38 U.S.C. 501a, provides:

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as

the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred, or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

QUESTION PRESENTED

Whether an ex-serviceman who suffers injury in a Veterans Administration hospital as a result of negligent treatment of a service-connected disability and thereby becomes eligible for and receives federal compensation benefits "in the same manner as if such [injury] were service connected" may maintain an action against the United States to

recover damages for the injury under the Tort Claims Act.

STATEMENT

Respondent Peter Brown's left knee was injured in the course of his World War II military service (R. 8). Because of that injury he was honorably discharged from the Army on August 6, 1944, and awarded monthly compensation benefits by the Veterans Administration (R. 5, 8).

Seven years later, in October 1951, while still receiving these Veterans Administration benefits of $15 per month,[1] Brown applied for and, "pursuant to his status as a veteran," was admitted to a Veterans Administration hospital in New York "for the purpose of having an operation performed upon his left knee" (R. 1, 8). In preparing Brown for surgery, a Veterans Administration operating room attendant applied an allegedly defective tourniquet causing serious injury to certain nerves in Brown's left leg (R. 2, 8). The monthly Veterans Administration benefits were thereafter increased to $119.70, and, effective July 1, 1952, were again increased to $135.45.[2] Brown has been receiving

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[1] The Veterans Administration informs us that prior to and at the time of his entry into the Veterans Administration hospital on October 1, 1951, respondent was receiving $15 monthly as disability compensation from the Veterans Administration. Appendix B, *infra*, p. 53.

[2] Effective April 22, 1952, respondent was awarded disability compensation at the rate of $119.70 per month. On July 1, 1952, his monthly payment was increased to $135.45 and he is currently receiving that monthly compensation. Appendix B, *infra*, p. 54. The Veterans Administration further informs us that $89.70 out of each $119.70 monthly payment represented the amount paid to respondent as compensation

this sum each month since July 1952, shortly after release from the hospital (R. 9).

Brown's complaint against the United States under the Tort Claims Act, filed on April 14, 1952, in the United States District Court for the Southern District of New York, asserted that the Veterans Administration employees were negligent in using the defective tourniquet (R. 1, 8). The United States answered, denying negligence on the part of the Government (R. 3). It also moved to dismiss the complaint "on the ground that * * * [respondent's] exclusive remedy is in the compensation statutes, 38 U.S.C.A. 501a," *supra*, pp. 2-3 (R. 6, 8-9). This motion, the district court stated, raised "the question whether a discharged veteran who has suffered further injury as a result of treatment of service incurred injury in a Veterans Administration Hospital and is receiving additional disability benefits for the resulting injury may recover under the Federal Tort Claims Act" (R. 13). Noting "a square conflict of authority on this point," the district court accepted "the reasoning of" *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D. C.), granted the Government's motion, and dismissed the complaint (R. 13, 14).

On appeal, the Court of Appeals for the Second Circuit reversed (R. 16-18). While recognizing that the *O'Neil* decision "favors the government's argument," the Second Circuit refused to follow it

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for the injuries sustained by him at the Veterans Administration hospital in October 1951, and that $103.95 out of each $135.45 monthly payment "represents the portion allocable to his hospital injuries." Appendix B, *infra*, p. 54.

and held instead that Brown's eligibility and receipt of compensation benefits from the Veterans Administration for the same injuries for which he filed the Tort Claims Act suit did not bar that suit (R. 18).

## SUMMARY OF ARGUMENT

The court below, in allowing a veteran to maintain an action under the Federal Tort Claims Act despite his eligibility for and receipt of Veterans Administration compensation benefits, has ignored the need for fitting the Act "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States*, 340 U. S. 135, 139. Respondent, it is estimated, will receive more than $52,300 in administrative benefits for the claim on which his Tort Claims Act suit is predicated. These comprehensive benefits available to respondent and other veterans for Veterans Administration hospitalization injuries preclude recovery under the Tort Claims Act of additional compensatory damages from the United States.

## I

A. This Court's decision in *Feres* v. *United States*, 340 U. S. 135, makes it plain that the comprehensive system of compensation benefits available to respondent is his sole remedy for his Veterans Administration hospitalization injury. In holding that veterans may not recover tort damages for injuries incurred while in service, *Feres* recognizes that the existence of a "comprehensive" system of relief for veterans and their dependents

bars an action under the Tort Claims Act. Later decisions by this Court, particularly *Johansen* v. *United States*, 343 U. S. 427, rely on *Feres* and make it even more apparent that the compensation system is the veteran's exclusive remedy. Various courts of appeals—in the Third, Fourth, Seventh, Ninth, and District of Columbia Circuits—have also relied on *Feres* for the same principle and have uniformly ruled that a suit against the United States for damages in tort must be dismissed where there exists a comprehensive statutory system authorizing administrative relief. Only the Court of Appeals for the Second Circuit, in the decision below, has refused to accept the *Feres* principle of exclusiveness of the compensation remedy.

*United States* v. *Gilman*, 347 U. S. 507, lends additional support to the rationale of the *Feres* case in that it holds that matters involving federal fiscal matters and federal relationships which have been the subject of peculiar legislative concern are not to be disposed of under the general language of the Tort Claims Act and ordinary common law concepts, but are to be left to the legislative branch of the Government for specific policy decision. Congress has provided veterans like respondent with a special remedy and the application of the *Gilman* doctrine would deny respondent the right to an additional recovery under the Tort Claims Act unless Congress now specifically directs otherwise.

B. Prior to 1946, Congress had created a complete and comprehensive system of law providing benefits for injuries sustained by veterans as a re-

sult of Veterans Administration hospitalization. The existence of this comprehensive compensation system, at the time of passage of the Tort Claims Act, manifests the full extent to which Congress, without regard to the Act, had recognized a public obligation to provide for Veterans Administration hospital injury or death claims.

1. Congressional consideration of the bill which later became the World War Veterans Act of 1924 reflects this legislative concern for adequate compensation provisions for such injury or death claims. Section 213 of that Act provided that veterans, injured by post-discharge hospitalization or medical treatment for which they were eligible by virtue of their military service, were to be awarded compensation benefits as if the injuries resulted from military service during the World War. In 1925, Congress expanded the coverage of Section 213 to authorize compensation for injuries sustained in the course of examinations for certain veterans benefits.

Although Section 213 was repealed by the Economy Act of March 20, 1933, the need for restoration of these compensation benefits for Veterans Administration hospital injuries soon forced its re-enactment as Section 31 of the Act of March 28, 1934. Section 31, under which respondent is now receiving monthly payments from the Veterans Administration, confers the same measure of benefits for hospital injuries as if the injuries were service-connected. In 1940 and 1943, Section 31 was broadened so that it now provides com-

pensation benefits to veterans injured through medical or surgical treatment or hospitalization to which they became entitled because of their military service, to veterans injured while being examined under any veterans' law, and to veterans injured while pursuing a vocational rehabilitation course.

Apart from Section 31, and prior to passage of Section 213, its 1924 predecessor, the Veterans Administration has consistently ruled that a veteran suffering an increase in a service-connected disability while being hospitalized is eligible for the full service-incurred compensation benefits available to servicemen and veterans. An increase in a service-connected disability is in no way dependent on the provisions or requirements of Section 31 or the earlier Section 213, and veterans injured as a result of medical treatment for service-connected disability were paid full compensation benefits prior to enactment of Section 213 in 1924 and during the period between Section 213's repeal in March 1933 and its reenactment as Section 31 of the 1934 Act. Even if the conditions for payment of benefits under Section 31 had not been present here, payment for the additional disability resulting from respondent's hospitalization for his service-connected condition would still have been made by the Veterans Administration.

2. Monthly compensation payments are provided for veterans who have incurred disabling injuries during their military service. The amount of monthly benefit may be as high as $491, depend-

ing on the degree of disability and the number of dependents. Since these statutory benefits apply to respondent's hospitalization injuries, he is now receiving monthly payments of $103.95 from the Government for the increased disability on which his instant Tort Claims Act suit against the Government is predicated. On the basis of his life expectancy, it is estimated that respondent will receive more than $52,300 from the Veterans Administration because of his hospital injuries.

This statutory compensation scheme reveals that Congress, prior to its passage of the Tort Claims Act, had already established an elaborate and carefully worked out statutory system for dealing with injuries or death of veterans as a result of Veterans Administration hospitalization.

## II

The refusal of the court below to follow *Feres* was apparently based on its assumption that that rule applies only where the injuries sued for arose out of or in the course of activity incident to military service. *Feres*, however, cannot be so limited. Its reach is coextensive with the existence and availability of the compensation remedy. But even if the suggested limitation on *Feres* is accepted, there is no room for doubt that respondent's hospital injuries arose out of and incident to his service. Under settled principles of veterans' compensation law and of workmen's compensation law, a hospital aggravation of a work-connected or service-connected injury must be considered as having

arisen out of the employment or service to the same extent as the original injury. Thus, respondent's action under the Federal Tort Claims Act is barred even if his limited reading of *Feres* is accepted.

ARGUMENT

The issue presented by this case is whether an ex-serviceman, who is negligently injured at a Veterans Administration hospital and thus becomes eligible for administrative benefits under the same comprehensive system of special statutory benefits as is available to military personnel for their service-connected injuries, may maintain an action against the United States for additional damages under the Federal Tort Claims Act. These administrative compensation benefits are currently being paid to respondent for the same hospital injuries on which his Tort Claims Act suit is predicated. The monthly compensation benefits will aggregate, it is estimated, the sum of $52,300.[3]

It is our position that the generous benefits of this compensation system constitute the veteran's exclusive remedy against the United States and preclude his recovery of additional damages from the United States under the Tort Claims Act. That Act, as this Court has ruled in rejecting another claim for additional damages brought by a serviceman "after plaintiff was discharged," cannot be invoked where "a comprehensive system of relief had [theretofore] been authorized for them and their dependents by [a prior compensation]

[3] See *supra*, pp. 4-5; *infra*, p. 40.

statute." *Feres* v. *United States*, 340 U. S. 135, 137, 145. In view of the availability of compensation benefits under the same comprehensive system of relief, we submit that the *Feres* ruling applies with equal force and calls for rejection of respondent's claim for his post-discharge hospital injuries.

The conceded availability of the compensation remedy is, by itself, sufficient to bar the respondent's tort action for additional damages and the judgment below should for that reason be reversed. Respondent, however, insists, and the court below agreed, that suit under the Act is precluded only where the availability of the compensation remedy is coupled with the further showing that the ex-servicemen's injuries arose out of or in the course of activity incident to the performance of his specific duties. We do not agree with this limitation, but even if it be accepted the settled principles of compensation law compel the holding that respondent's injuries arose out of his service and were incident thereto. Consequently, the judgment below must fall even when measured against the proper application of the very theory relied on by respondent and adopted below.

# I

## The Existence of a Comprehensive and Uniform Federal System of Compensation Benefits for Ex-Servicemen Injured as a Result of Veterans Administration Hospitalization Precludes Additional Recovery of Damages Under the Federal Tort Claims Act

### A. *In general, the creation by the Government of a comprehensive system of compensation benefits precludes the beneficiary from receiving damages for the same injury under the Tort Claims Act.*

It is a settled principle that where Congress, over a long period of time and through a series of enactments, has legislated with respect to a particular subject matter in such a manner as to create a complete and inclusive system for dealing therewith, subsequent statutes of general scope, which would otherwise apply, are normally held to be inapplicable to the special subject matter. *United States* v. *Barnes*, 222 U. S. 513, 520; *United States* v. *Sweet*, 245 U. S. 563; *Ozawa* v. *United States*, 260 U. S. 178, 193, 194; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396; *United States* v. *American Trucking Associations*, 310 U. S. 534, 544; *Townsend* v. *Little*, 109 U. S. 504, 512; *United States* v. *Fixico*, 115 F. 2d 389, 393 (C. A. 10); *Iriarte et al.* v. *United States*, 157 F. 2d 105, 108 (C. A. 1). See also *infra*, pp. 15-23.

This rule applies with full force in determining whether claim statutes of general application, such as the Federal Tort Claims Act, are to be con-

strued so as to authorize relief with respect to claims theretofore covered by a comprehensive administrative and statutory system. This Court has already so held in a case presenting the issue now again before the Court, *i. e.*, whether the existence of an extensive compensation system for service-incurred injury or death bars an action for additional damages under the Federal Tort Claims Act. Answering this question in the affirmative in *Feres* v. *United States*, 340 U. S. 135, 140, the Court, without dissent, held the Tort Claims Act inapplicable to claims by servicemen or their dependents primarily because a "comprehensive system of relief had [theretofore] been authorized for them and their dependents by [prior] statute."

As we show in detail below (*infra*, pp. 27-41), this same comprehensive system of relief applies to respondent and compensation is now being paid by the Veterans Administration for his hospital injuries. Consequently, the *Feres* holding that the existence of this "comprehensive system of relief" for veterans and their dependents bars their later action under the Tort Claims Act is, we submit, dispositive here and calls for reversal of the judgment below. We do not believe that the *Feres* holding, as suggested by the Court of Appeals, turned on the fact that the soldiers' injuries arose out of or in the course of activity incident to their military service (R. 17).[4] To the contrary, analysis

[4] Even if this limitation on the *Feres* holding should be accepted, we show below that respondent's hospital injuries must be considered as having arisen out of or in the course of activity incident to his military service. *Infra*, pp. 41-47.

of the *Feres* opinion (and later decisions by this and other courts) makes it clear that the *ratio decidendi* of the *Feres* exclusion from the Tort Claims Act of veterans' claims for service injury or death was the existence of the comprehensive compensation system, the benefits of which are fully available to respondent.

1. *The holding* in *Feres* v. *United States*, 340 U. S. 135, *is based on the exclusiveness of the compensation remedy.*—Throughout the *Feres* opinion, the Court makes it clear that its decision rested primarily on the existence of the compensation system. Thus, in 340 U. S. at 139, the Court remarked that all considerations suggesting that veterans' claims are cognizable under the Tort Claims Act must be swept aside because this Act must "be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government." With clear reference to this prior "system of remedies", the Court declared that (340 U. S. at 140)—

> The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.

And the opinion later points out expressly that the "system of remedies" and the benefits referred to were the "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death" of servicemen. 340

U. S. at 144. Noting that this "compensation system, which normally requires no litigation, is not negligible or niggardly * * * [and] compares extremely favorably with those provided by most workmen's compensation statutes," the opinion concludes that this "comprehensive system of relief" must, "in the absence of express congressional command" in the Tort Claims Act to the contrary, be considered as the exclusive remedy for veterans and their dependents. 340 U. S. 140, 145, 146.[5]

2. *Subsequent decisions fortify the view that the Feres case was based on the exclusiveness of the compensation remedy.*—That the existence of the uniform and comprehensive compensation system for injury or death of servicemen was the basis of the *Feres* decision is made even more appparent by later rulings of this Court interpreting and applying that case. In *Johansen* v. *United States*, 343 U. S. 427, the Court held that the administrative benefits available under the Federal Employees Compensation Act precluded a government employee from suing the United States under the Public Vessels Act, even though at the time of the injuries for which damages were sought there was no express declaration in the Federal Employees Compensation Act that the remedies thereunder were

[5] It is worthy of emphasis that in none of the three cases decided in the *Feres* opinion was the plaintiff still in the military service when suit was brought. *Jefferson* was a veteran (340 U.S. at 137), and the *Griggs* and *Feres* suits were brought by the soldiers' executrices and dependents (340 U.S. at 136, 137). As noted by the Court in the *Feres* opinion, the actions were "by widows or surviving dependents" or were "brought after the individual was discharged". 340 U. S. at 145.

exclusive. Eliminating all doubt that the Court viewed the *Feres* holding as being based on the "exclusive character" of the compensation system, the *Johansen* opinion states (343 U. S. 427, 440, 441):

> * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States*, 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." p. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.
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> * * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

Shortly thereafter, in *Dalehite* v. *United States*, 346 U. S. 15, the Court again reiterated the basis for its decision in the *Feres* case by pointing out that it was "the existence of a uniform compensation system" which "led us [in the *Feres* case] to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law." 346 U. S. 15, 31, note 25.

The various courts of appeals, with the exception of the decision below, have also understood the

*Feres* case to stand for the proposition that the existence of a comprehensive and generous scheme of special statutory benefits forecloses resort to a tort action against the United States. In *Lewis* v. *United States,* 190 F. 2d 22, certiorari denied, 342 U. S. 869, the District of Columbia Court of Appeals held that a U. S. Park policeman whose compensation statute, like that of the employees in *Johansen* and the veterans in *Feres,* contained no express declaration of exclusiveness was nevertheless barred by virtue of the compensation statute from maintaining a Tort Claims Act suit. After quoting this Court's language in *Feres* as to the importance of "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services," the court of appeals observed (190 F. 2d 22, 23):

> By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment entitled "to all the benefits of relief and retirement" furnished by the "policemen and firemen's relief fund, District of Columbia." That "statutory scheme contemplates a broad system of relief, by way of medical and hospital care and treatments, pensions, retirement. * * *" As was said in the *Feres* case, "If Congress

> had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." 340 U. S. 135, 144. * * *

Similarly, in *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D.C.), the court, holding that the veteran's eligibility for compensation benefits for his Veterans Administration hospital injury precluded his Tort Claims Act suit, stated (202 F. 2d 366, 367):

> * * * we think the basic principle of the [*Feres*] case covers this appeal. In *Johansen* v. *United States*, 343 U. S. 427, 439, 440, 72 S. Ct. 849, 856, 96 L. Ed. 1051 the Court said: "There is no reason to have two systems of redress. * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States* * * *."[6]

Still other courts of appeals' decisions recognize that the basic principle of the *Feres* case is its ac-

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[6] For district court decisions ruling that the veteran's eligibility for compensation benefits bars a Tort Claims Act suit for Veterans Administration hospital injuries, see *Pettis* v. *United States*, 108 F. Supp. 500, 501 (N.D. Cal.), where the court noted that "under the Supreme Court decision in *Feres* v. *United States*, 340 U.S. 135, plaintiff is precluded from suing under the Tort Claims Act"; *McCalop, Admr.* v. *United States* (E.D. N. Car., No. 551, unreported decision dated Jan. 26, 1954), holding that the "veteran's estate may not recover under the Federal Tort Claims Act for disability or death arising out of treatment in the veterans' facility for which his estate has already been awarded disability compen-

ceptance of the exclusive character of federal compensation plans. The Third Circuit in *Mandel* v. *United States*, 191 F. 2d 164, affirmed *sub nom. Johansen* v. *United States*, 343 U. S. 427, held that "an injured person who is eligible to compensation [cannot] claim additional rights against the United States" and based its decision in part on its understanding that the Supreme Court, in *Feres*, had "relegated [veterans] to their compensation and pension remedies." 191 F. 2d 164, 166, 168. Both the Court of Appeals for the Fourth Circuit in *Jefferson* v. *United States*, 178 F. 2d 518, and the Court of Appeals for the Second Circuit in *Feres* v. *United States*, 177 F. 2d 535, whose decisions were affirmed in the *Feres* case, forecast the rationale of that decision by concluding that "the provision which Congress has made for military persons in the form of disability payments and pensions" (178 F. 2d 518, 519) made suit under the Tort Claims Act inappropriate.

The decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Firth*, 207 F. 2d 665, also takes the same view. In directing the

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sation 'as if such disability were service connected' for the two are incompatible"; and *Engelman* v. *United States* (S.D. Cal., No. 1128, unreported decision dated August 12, 1953), holding that because of the veteran's "exclusive remedy under the compensation system" he "was foreclosed from instituting an action against the United States under the Federal Tort Claims Act." Compare *Sigmon* v. *United States*, 110 F. Supp. 906, 911 (W.D. Va.), holding in another Tort Claims suit that Congress intended "to provide this measure of [administrative] compensation * * * and only this measure" for prisoners negligently injured in a federal reformatory.

dismissal of a wrongful death action filed against the United States under the Public Vessels Act, the court, relying on the *Johansen* case, which as we have shown was itself based on the *Feres* principle of the exclusive character of the compensation remedy, pointed out that the decedent's "heirs must look to the Federal Employees Compensation Act for relief." And the Seventh Circuit Court of Appeals, in directing that a Tort Claims Act complaint be dismissed and that the claimant be remitted to his compensation remedy, also pointed out that *Johansen* "is decisive of the question of exclusiveness of the remedy afforded injured employees by the Federal Employees Compensation Act." *Sasse* v. *United States*, 201 F. 2d 871, 872. See also *Archer* v. *United States*, 112 F. Supp. 651 (S. D. Cal.) (pending on appeal, No. 13930, C.A. 9).[7]

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[7] Identical considerations have compelled courts considering various other types of legislation permitting suit against the United States to hold that the administrative compensation remedy precludes alternative relief under the statute authorizing suit. In *Dobson* v. *United States*, 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U.S. 653, the court stated (27 F. 2d 808, 809):

> Verbally, there is nothing [in the Public Vessels Act] which excludes liability for damage to property or person of officers or crew. * * *
>
> Nevertheless, the construction contended for by appellants involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms. The Act of

In sum, the *Feres* case, as applied by this Court and by all courts of appeals other than the court below, requires that a suit for damages be dismissed where there exists a comprehensive statu-

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October 6, 1917 (40 Stat. 389 [34 U.S.C.A. Sections 981, 982]) directs the Paymaster General of the Navy to reimburse officers, enlisted men, and others in the naval service * * *.

Chapter 3, title 38, United States Code (38 U.S.C.A. Sections 151-206) provides an elaborate pension system for personal injury and loss of life incurred by officers and enlisted men in the navy. These pensions may be thought an inadequate substitute for the recovery of full damages under the Public Vessels Act of March 3, 1925, but they were well known to all who entered the naval service. * * * If it had been the purpose to change that policy as respects officers and seamen of the navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found in the above-quoted section 1. * * *

We believe that Congress meant to leave upon the members of the naval forces the same risks of injuries suffered in the service of the United States as they had before.

Similarly, in *Bradey* v. *United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U.S. 795, Chief Judge Learned Hand stated (151 F. 2d at 743):

It is quite true that nothing in the text of the Public Vessels Act bars suit by a member of the armed forces, but in *Dobson* v. *United States*, 2 Circ., 27 F. (2d) 807, cert. den. 278 U.S. 653, 49 S. Ct. 179, 73 L. Ed 563, we held that, because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection. That case directly rules here; and to succeed, the libellant must prevail upon us to overrule it. This she attempts to do on the ground that the course of judicial decision since then discloses a change of attitude toward such sufferers.

We find no evidence of such a change, nor do we see any antecedent reason to think that we were wrong before. * * * The compensation provided for the Navy is indeed not the same as that provided under the United States

tory system authorizing administrative relief. The reach of the *Feres* case, therefore, is coextensive with the existence and availability of the administrative compensation plan.[8]

This uniform understanding of the *Feres* case shows that respondent can draw no comfort from *Santana* v. *United States*, 175 F. 2d 320 (C.A. 1) and *Bandy* v. *United States*, 92 F. Supp. 366 (D. Nev.). Both of those cases were decided before, and without the benefit of, this Court's decisions in *Feres* and *Johansen*. Cf. 25 A.L.R. 2d 249, note

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Employees Compensation Act, 5 U.S.C.A. § 751 et seq.; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive; and the decree will be affirmed.

Accord: *Goldstein* v. *New York*, 281 N.Y. 396, 403, 24 N.E. 2d 97; *Seidel* v. *Director General of Railroads*, 149 La. 414, 89 So. 308; *Moon* v. *Hines*, 205 Ala. 355, 87 So. 603; *Bryson* v. *Hines*, 268 Fed. 290 (C.A. 4); cf. *Posey* v. *T.V.A.*, 93 F. 2d 726, 728 (C.A. 5).

[8] A claim for tort "damages has almost invariably been denied where some applicable workmen's compensation act existed under which the employee could have claimed compensation." *Jonathan Woodner Co.* v. *Mather*, 210 F. 2d 868, 873 (C.A. D.C.). Limiting the private employee to workmen's compensation benefits cannot be viewed as discriminating against him even though a third party suffering the same damages through the negligence of the same employer would have access to court action against the employer. See *State* v. *Swope*, 56 N. Mex. 782, 251 P. 2d 266, and cases there collected. Similarly, restricting veterans or their dependents to the analogous and frequently more generous benefits of the military and veterans laws cannot be viewed as discriminatory. In both instances, relief for injury or death is not subject to the uncertainties, expense, and delay of litigation but is guaranteed through direct, certain, administrative payments.

19. See also *O'Neil* v. *United States*, 202 F. 2d 366, 367 (C.A.D.C.), rejecting the *Santana* decision because it "was decided before the *Feres* case." Nor do we believe that respondent's reliance on this Court's earlier opinion in *Brooks* v. *United States*, 337 U. S. 49, is justified. The *Feres* decision makes it plain that any subsisting effect of the *Brooks* case must be restricted to the particular factual situation involved in that case, *i.e.*, a serviceman injured, while on furlough or leave, in circumstances wholly unrelated to his service. The instant case presents no such factual situation, and the development of doctrine in this field indicates that *Brooks* is not to be extended beyond its own particular confines.

3. *The decision in United States* v. *Gilman*, 347 U. S. 507, *furnishes an additional reason for applying the doctrine of the Feres case to a veteran, who has the benefit of a special statutory scheme of compensation.*

The recent decision of this Court in *United States* v. *Gilman*, 347 U. S. 507, lends much support to the rationale of the *Feres* decision. In that case the United States sued an employee for indemnity for damages in which it had been cast as a result of the employee's negligence, relying on the common-law right of an employer to be indemnified by an employee for whose negligence it had been held liable to a third party. In holding that the United States could not recover, the Court observed (p. 509):

> The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other employees—these are a few of the aspects of the problem on which Congress has legislated. Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches. * * *

And after discussing the problems involved, considering both the morale and efficiency of the employees and the financial and fiscal burdens of the Government, the Court concluded that the questions concerned fiscal matters for which Congress alone should formulate the policy, citing its prior decision in *United States* v. *Standard Oil Co.*, 332 U. S. 301. The Court concluded (pp. 511-513):

> The reasons for following that course in the present case are even more compelling. Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy, which is most advantageous to the whole, involves a host of considerations that must be

weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

In the present case, we have the relationship between the Government and the veterans of its various wars—a close and intimate relationship which has been the subject of even greater legislative concern than that of government and employee. Congress continually deals with the rights and privileges of veterans against the Government in various aspects.[9] In *Gilman*, a comparable relationship moved the Court to deny the Government's claim under general law, even though Congress had not taken any position on the particular issue before the Court (347 U. S. at 511). Here, Congress has taken a stand, at least inferentially, and over the years has provided a special remedy which is adequate and comprehensive (see *infra*, pp. 27-41). There is, therefore, greater reason for holding that the question of whether to grant to veterans the additional right to recover under the general terms of the Tort Claims Act for the same injuries for which they may recover compensation is a policy question which should be left to Congress.

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[9] There is set forth in Appendix A, *infra*, pp. 49-52, a brief resume of the statutes relating to veterans. See *infra*, pp. 27-41, for the history and details of the compensation system available to veterans.

B. *Congress has provided a complete and comprehensive compensation system for injury or death of ex-servicemen as a result of treatment at a veterans hospital.*

The comprehensiveness and adequacy of the compensation system set up by Congress for caring for veterans injured through Veterans Administration hospitalization is made apparent by (a) the detailed congressional enactments for such injuries over the past thirty years, (b) the incorporation by Congress into those acts of the elaborate compensation system developed for injured and disabled soldiers and their dependents, and (c) the nature and extent of the compensatory benefits available under the current legislation. These statutory benefits are equally available to veterans injured in the course of treatment of a service-connected or of a non-service-connected condition.[19] Their breadth and coverage underscore the full extent to which the Government, at the time of passage of the Tort Claims Act, recognized a public obligation to provide for Veterans Administration hospital injury or death claims.

1. *The statutory system for compensating veterans for injuries caused by Veterans Administration hospitalization.* More than thirty years ago, Congress concerned itself with the need for extend-

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[19] The coverage of the compensation system with respect to veterans who, like respondent, are injured while being hospitalized for service-connected injuries, is also supportable on grounds independent of the legislation dealing with injuries at veterans' hospitals. See *infra*, pp. 32-38.

ing adequate compensation to veterans injured as a result of Veterans Administration hospitalization. A complete consolidation and re-enactment of laws pertaining to veterans was introduced in 1924 in the First Session of the Sixty-Eighth Congress. Early in the consideration of S. 2257, the bill by which the consolidation was effected, the need for compensating "injuries or death resulting from hospitalization" was expressed. S. Rept. 397 on S. 2257, 68th Cong., 1st Sess., p. 5. A specific amendment to compensate such injuries "in the same manner as though such injury had occurred in military service" was accordingly added to S. 2257 and agreed to without objection. *Ibid;* cf. 65 Cong. Rec. 5458, 7471. In this amended form, S. 2257 became law as the World War Veterans Act of June 7, 1924. Section 213 of that Act, setting forth the language of the amendment, directed that veterans who suffered injury, disability, or death as the result of post-discharge hospitalization or medical or surgical treatment for which they had become eligible by virtue of their military service, were to be "awarded" compensation benefits "in the same manner as though such disability, aggravation, or death was the result of military service during the World War." 43 Stat. 623.

Less than a year later, Congress expanded the coverage of Section 213 and extended its benefits to veterans injured in the course of medical examinations "made in the diagnosis" of their cases. 66 Cong. Rec. 5262. H. R. 12308, 68th Cong., 2d

Sess., which became the Act of March 4, 1925 (43 Stat. 1302), authorized compensation benefit payments for injuries caused by examinations for veterans benefits under the War Risk Insurance Act (38 Stat. 711) or the World War Veterans Act of 1924 (43 Stat. 615).

Section 213, as so expanded, remained in effect until its repeal by the Economy Act of March 20, 1933 (48 Stat. 11). However, the need for restoring these compensation benefits soon made itself evident. Congress reenacted Section 213 as Section 31 of the Act of March 28, 1934 (48 Stat. 526, 38 U.S.C. 501a). Section 31, as was explained to the Congress which passed it, "is a mere reenactment of the law as it existed prior to the Economy Act." 78 Cong. Rec. 3298. That section, under which respondent is now receiving monthly payments from the Veterans Administration, authorizes compensation for "any veteran" injured or killed as the result of post-discharge "hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination" under the War Risk Insurance Act (38 Stat. 711) or the World War Veterans Act of 1924 (43 Stat. 615). This statute, like the earlier Section 213, prescribes the same measure of benefits "as if such disability, aggravation, or death were service connected" within the meaning of the laws granting benefits to World War veterans.

Congressional insistence upon broadening the scope of the compensation scheme developed for compensating veterans injured in Veterans Administration hospitals led to a further extension of its benefits in 1940. The 1934 statute, as has been noted, limited its coverage, with respect to injuries to a veteran submitting to an examination, to those veterans examined under the two specified statutes —the War Risk Insurance and World War Veterans Acts. In the 76th Congress, Section 12 of the Act of October 17, 1940 (54 Stat. 1197, 38 U.S.C. 501a-1) removed this limitation and extended the benefits to veterans who suffered injury as a result of having submitted to examination under authority of "*any of the laws* granting monetary or other benefits to World War veterans" (emphasis added).

The legislative history of H. R. 8930, 76th Cong., 3d Sess., which was enacted as Section 12 of the Act of October 17, 1940, confirms the consistent congressional purpose to extend this compensation system as far as possible. Section 12 which did not appear in the bill as introduced into the House was added by the Senate with the following explanation (86 Cong. Rec. 13490):

> Under the existing provisions of Public, No. 141, 73d Congress [Sec. 31, Act of March 28, 1934], compensation is restricted to injuries or aggravation resulting from examinations under the War Risk Insurance Act or the War Veterans Act, 1924, as amended. The section

> [12] would extend the right to benefits in connection with examinations under existing laws other than those heretofore specified.

And the Report of the Senate Committee on Finance on H. R. 8930 shows that Section 12 would implement the expansion of coverage of the compensation system by providing "for the payment of benefits on the same basis with respect to injuries sustained as the result of examination under any of such laws." S. Rept. 2198, 76th Cong., 3d Sess., p. 12.

Three years later, in 1943, Congress once again extended the coverage of this compensation system. By the Act of March 24, 1943 (57 Stat. 43, 44) Veterans' Regulation No. 1(a) was amended so as to make these benefits available to any World War II veteran who "suffers an injury or an aggravation of any injury, as a result of the pursuit of such course of vocational rehabilitation."

Thus, the 1924 statute, as expanded in 1925, reenacted in 1934, and further supplemented by the 1940 and 1943 enlargements of its coverage, provides compensation benefits to any veteran injured (1) as a result of medical or surgical treatment or hospitalization to which he became entitled because of his military service, (2) while being examined under any of the veterans laws, or (3) in a vocational rehabilitation course.

There are additional factors, apart from the broad category of permissible beneficiaries, manifesting the comprehensiveness of this benefit sys-

jury of a veteran at a Veterans Administration hospital and that respondent's action for additional damages under the Tort Claims Act is accordingly barred. Respondent, however, has pointed to this Court's statement in *Feres* that that case was concerned with injuries which "arise out of or are in the course of activity incident to [military] service." 340 U. S. 135, 146. This statement, respondent contends, means that more than the existence of a comprehensive system of administrative benefits to compensate a plaintiff is required to bar his tort action. It must also be shown, respondent argues and the court below agreed, that the injuries arose out of or in the course of service (R. 17). Our discussion in Point I shows, we believe, that it misreads the *Feres* doctrine to stress service incidence as the controlling factor; the significant element is the comprehensiveness of the federal compensation scheme open to the injured person. *Supra*, pp. 13-24. But we submit that even under respondent's theory the hospital injuries sustained by him arose out of and incident to his service, and his claim thus falls within the area in which he himself concedes that suit under the Tort Claims Act is barred.

In order fully to understand what this Court meant by service-incidence when, in the *Feres* case, it excluded from the coverage of the Tort Claims Act claims which "arise out of or are in

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statutes, see State Veterans Laws (79th Cong., 1st Sess., House Committee Print No. 81). See also Appendix A, *infra*, pp. 39-52.

the course of activity incident to service," it is helpful to examine the holding in *Brooks* v. *United States*, 337 U. S. 49. There, the Court, in permitting recovery for injuries to members of the armed services on furlough, stated, "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented" (p. 52). In *Feres*, this Court stated, "The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong. This is the 'wholly different case' reserved from our decision in *Brooks* v. *United States*, 337 U. S. 49, 52" (340 U. S. at 138). While the Court wisely did not define specifically what is meant by "incident to service," the phrase unquestionably carries a connotation beyond actions performed pursuant to military orders. The discussion of geographic considerations in the *Feres* opinion (340 U. S. at 143) discloses that much.

The language "arising out of or in the course of activity incident to service" paraphrases, at the least, the established concept of "arising out of and in the course of employment" in workmen's compensation law. And this Court's use in *Feres* of the terms "arising out of or in the course of activity incident to service" interchange-

tem. It is especially significant that the benefits payable under Section 31 of the 1934 statute (38 U.S.C. 501a) to a veteran injured at a Veterans Administration hospital are not limited to situations involving negligence or malpractice. Even where the disability incurred at the hospital results from "error in judgment" or "an accident," compensation payments will be made to the veteran. 38 C.F.R. 3.123(b)(4); 9 Comp. Gen. 515, 516. Furthermore, in line with the broadening of the area of coverage of the 1934 statute, a contagious disease contracted by a veteran while hospitalized in a Veterans Administration hospital has been administratively construed to be a compensable "injury" within the meaning of that term as used in the statute. Decisions of the Administrator of Veterans' Affairs, No. 716, Vol. 1, Supp. 1, p. 1., July 8, 1946. [11]

2. *Comprehensive compensation coverage for injury to veterans, like respondent, hospitalized for service-connected conditions is supportable independently of the statute.* As already noted, Section

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[11] In that case, the Administrator of Veterans' Affairs decided that "compensation payments are in order" where "the veteran is discharged from the Veterans Administration hospital after prostatectomy and two days later developed diphtheria to which he had been exposed while at the Veterans Administration hospital. He was taken from his home to a non-Veterans Administration hospital for treatment of this disease." Decisions of the Administrator of Veterans' Affairs, No. 716, Vol. 1, Supp. 1, pp. 1, 2, July 8, 1946. For still further administrative expansion of the scope of Section 31, see Decisions of the Administrator of Veterans' Affairs, No. 805, Vol. 1, Supp. 3, p. 56, February 7, 1949.

31's benefits are not limited to veterans who are hospitalized or treated for service-connected conditions but are equally available to those hospitalized or treated for non-service-connected conditions.[12] However, it is significant that broad protection is also afforded, without regard to Section 31, to veterans who, like respondent, report to Veterans Administration hospitals for treatment of a service-connected condition. It has consistently been held by the Veterans Administration, even prior to Section 213 of the Act of June 7, 1924, that a veteran, suffering an increase in a service-connected disability while being hospitalized and treated for that disability, is entitled to the full compensation benefits he would have been eligible for had the aggravation been actually incurred during his active military service. Thus, where a veteran died while undergoing treatment at a Veterans Administration hospital for a service-connected disability, it was held, even before Section 213 became law in 1924, that veterans' benefit payments should be made because the "death can be regarded as proximately resulting from the service connected disability." Digest of Legal Opinions Relating to Veterans' Bureau, April 8, 1924, No. 8, pp. 1-2. On the other hand, it was held prior to the 1924 Act that where the veteran was "receiving treatment in a bureau hospital for a nonservice con-

[12] Veterans may qualify for Veterans Administration hospitalization, "irrespective of whether the disability, disease, or defect was due to service." Act of March 28, 1934, 48 Stat. 526, 38 U.S.C. 706.

nected disability, and as a result of such treatment received a permanent disability, such [permanent] disability is not service connected" and therefore not compensable. *Id.*, April 15, 1924, No. 8, p. 2; *Id.*, October 11, 1923, No. 2, p. 8.

With the enactment of Section 213 of the 1924 Act, hospital aggravation of a non-service-connected disability became compensable for the first time, within the limits of that provision. But compensation for hospitalization injuries incurred in the treatment of a service-connected disability could be made, as had been the case before Section 213, without regard to that Section's provisions or requirements. A Veterans Bureau General Counsel's opinion of March 20, 1928, involved a claim for compensation for an "ear disability [which] was actually the result of surgical treatment for service-connected disabilities." In approving payment, the opinion emphasized that the "additional compensation is payable for the ear condition in this case without resorting to the provisions of Section 213 for the reason that the said ear condition must be regarded as having been incurred while submitting to treatment for a service-connected disability." 51 Gen. Counsel Op. 191, unpublished opinion on file at Veterans Administration, and cited with approval in Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 110, 112, May 8, 1947, and in Decision of the Administrator of Veterans' Affairs, No. 822, Vol. 1, Supp. 4, pp. 15, 16, August 30, 1949. Another General Counsel's opinion of October 31,

1929, also makes it plain that "If it be determined that the disability is due to an operation on account of a service connected disease or injury then the claimant's present disability may be rated without the aid of Section 213. * * * If it be determined that the claimant's present disability arose from an operation upon a non service connected injury or disease his present disability will have to be rated under Section 213." 60 Gen. Counsel Op. 366, unpublished opinion on file at Veterans Administration. Summarizing these views, a General Counsel's opinion, dated March 17, 1930, declares:

> These cases support the ruling laid down in the opinion of this Service in the instant case. This Service, therefore, adheres to its previous opinion that any disability flowing from an operation performed for the purpose of relieving a service connected disability, is also service connected as the proximate result of the injury or disease, and that in such cases it is not necessary to invoke the provisions of Section 213, supra, in order to grant service connection therefor [62 Gen. Counsel Op. 386, unpub. op. on file at Veterans Administration].

There being no need to rely on Section 213 to compensate hospital injuries arising in the course of treating service-connected disabilities, it was possible to continue to make compensation payments for such injuries during the period between March 20, 1933, when Section 213 was repealed, and March 28, 1934, when it was substantially re-en-

acted as Section 31 of the 1934 Act (*supra*, p. 29). For that reason, a September 21, 1933, opinion of the Veterans Administration Solicitor points out that, despite the repeal of Section 213, if a veteran was injured "as result of medical or surgical treatment awarded [him] for a service-connected disability, he will be entitled to continue to receive a pension on account of the disability so incurred." 10 Op. Sol. 230, unpublished opinion on file at Veterans Administration, and cited with approval in Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 110, 112, May 8, 1947, and in Decisions of the Administrator of Veterans' Affairs, No. 822, Vol. 1, Supp. 4, pp. 15, 16, August 30, 1949.

Similarly, after Section 31 became law in 1934, a veteran's eligibility for increased benefits for the hospital aggravation of a service-connected condition was not conditioned on compliance with the requirements of Section 31. In other words, a veteran who is injured at a Veterans Administration hospital as a result of treatment of a service-connected condition does not, in order to be eligible for the additional benefits for that injury, have to show that the hospitalization injury resulted from negligence, malpractice, error in judgment, or accident (*supra*, p. 32). The facts in a 1947 Veterans Administrator decision are illustrative. After his discharge from the service, a veteran was admitted to a Veterans Administration hospital for treatment of service-connected hemorrhoids. A

spinal anesthetic administered incident to the hemorrhoidectomy resulted in the loss of use of the patient's legs. The Veterans Administration ruled that the loss of use of his legs must "be considered as having resulted from a disability incurred during World War II," so as to entitle the veteran to additional disability benefits resulting from the hospital treatment and to an automobile furnished to those World War veterans entitled to compensation for loss of use of a leg in World War II service. Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 111, 112, May 8, 1947. These benefits were paid without reference to Section 31 and were based on the sole ground that the additional injuries resulting from hospitalization took place in the course of treatment of a service-connected condition. Another decision in 1949 shows that, without regard to Section 31, additional disability benefits may be paid for the aggravation of a service-connected injury caused by even a *private* physician's treatment of that service-connected condition. Decisions of the Administrator of Veterans' Affairs, No. 822, Vol. 1, Supp. 4, pp. 15, 16, August 30, 1949.

From these rulings it is clear that a hospital injury incurred in the course of treatment of a service-connected disability is compensable as a matter of course and without any regard for the provisions or requirements of Section 31. At the same time, these decisions make clear the all-inclusive and comprehensive nature of the administrative com-

pensation remedy available to respondent. For, even if the statutory prerequisites for payment of benefits under Section 31 of the 1934 Act (38 U.S.C. 501a) had not existed in this case,[13] payment for the additional disability resulting from the respondent's hospitalization for his service-connected condition would nevertheless have been made by the Veterans Administration.

Whether the monthly compensation benefits the respondent now receives are considered as payments under Section 31 or could be paid without regard to Section 31 is immaterial. In both cases, the extent of benefits is that provided in the detailed program developed by Congress for compensating veterans for service-incurred disability. To a brief review of the scope of the benefits under that program we now turn.

3. *Payments and other benefits currently available under the comprehensive statutory program.* The benefits currently available under the statutory system developed by Congress for compensating veterans and their dependents for injury or death in service compare, as this Court has noted, "extremely favorably with those provided by most workmen's compensation statutes." *Feres* v. *United States*, 340 U. S. 135, 145.[14] The principal bene-

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[13] That they did exist is plain from the record (R. 17).

[14] If respondent were allowed to recover under the Tort Claims Act, these compensation benefits would have to be deducted from his recovery (see *Brooks* v. *United States*, 337 U.S. 49, 53-54; *United States* v. *Brooks*, 176 F. 2d 482 (C.A. 4), and it is most unlikely that his ultimate recovery would be

fits under this scheme are, together with a vast number of other statutes conferring additional benefits on veterans, codified in Title 38, of the United States Code. In addition, Title 10 (Army), Title 34 (Navy), and Title 37 (Pay and Allowances of Army, Navy, Marine Corps, Coast Guard) contain many other statutes on military benefits and perquisites. The adequacy and inclusiveness of this statutory plan is shown by reference to but two of the more important provisions under which more than 2.4 billion dollars of compensation and pension benefits are paid annually. See *infra*, p. 49.

a. Monthly compensation payments are provided for veterans who have incurred partial or total disabling injuries during their period of military service (Act of March 20, 1933, Sec. 1(a), 48 Stat. 8, 38 U.S.C. 701(a); Act of July 13, 1943, 57 Stat. 554; Act of May 11, 1951, 65 Stat. 40, 38 U.S.C. 745). The amount of the disability compensation depends, of course, on the degree of disability and may be as high as $400 per month (Act of September 20, 1945, 59 Stat. 533, 534, amending Vet. Reg. 1 (a), part I, paragraph II (k); see 38 C.F.R. 3.236 (1952 Cum. Supp.)). In addition to these monthly compensation rates, a veteran with a disability of 50% or more is entitled to supplemental compensation payments, ranging from $14 to $91 each

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substantial enough to justify the burden and expense, both for him and the Government, of prolonged litigation in the courts. This is another reason why the fair, generous, and certain system of compensation benefits should be held to be the exclusive remedy. See *Feres* v. *United States*, 340 U. S. 135, 145.

month, based on the degree of disability and the number of dependents. Disability compensation continues to be paid until the veteran's death or until the disability has ceased. Where the disability is shown to have increased after a veteran's award of compensation has been made, commensurate increases in the pension will be made (Act of June 21, 1879, 21 Stat. 23, 30, as amended, 38 U.S.C. 57).

These service-incurred compensation provisions are fully applicable to the increased disability sustained by respondent at the Veterans Administration hospital, and he is now receiving compensation benefits of $103.95 per month from the Government for the increased disability on which his instant claim against the United States under the Federal Tort Claims Act is based. For the two year period since these payments took effect in July 1952, the $103.95 monthly payments received by respondent total practically $2,500.[15] Moreover, on the basis of his life expectancy, it is estimated that the total monthly compensation benefits to be paid by the Veterans Administration to respondent because of his hospital injuries will aggregate more than an additional $49,800.[16]

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[15] $2,494.80 is the product of 24 x $103.95, the portion of each monthly payment paid to respondent as compensation for his Veterans Administration hospital injuries from July 1, 1952 to July 1, 1954. See footnote 2, *supra*, p. 4.

[16] The $49,800 estimate is based on the receipt of $103.95 per month over an expected life span of 40 years for a 30-year-old man. Statistical Abstract of the United States, 1953 (H. Doc. No. 99, 83d Cong., 1st Sess.), Expectation of Life Table, p. 69. See footnotes 1 and 2 and 15, *supra*, pp. 4 40. Appendix B, *infra*, p. 54. The $42,000 estimate, referred to at page 8 of our petition for certiorari, failed to take into account the

b. Existing federal laws also provide for monthly compensation payments to the widow, children, and dependent mother and father of "any deceased person who died as the result of injury or disease incurred in or aggravated by active military or naval service" (Veterans' Regulation No. 1(a), part I, par. IV, Ch. 12A, 38 U.S.C. p. 5575; Act of March 20, 1933, Sec. 1(c), 48 Stat. 8, 38 U.S.C. 701(c); 38 C.F.R. 4.122, 4.124 (1952 Cum. Supp.)). A widow, with one child, may be awarded by the Veterans Administration the sum of $121 per month (38 C.F.R. 4.124 (1952 Cum. Supp.)). For each additional child, the widow is entitled to $29 per month *(id.)*. A dependent mother and father may be awarded an additional $60 per month *(id.)*.[17]

## II

### In Any Event, There Can Be No Recovery Under the Federal Tort Claims Act of Damages for a Veteran's Hospital Injury Arising Out of His Military Service

In Point I we have shown that there exists a comprehensive statutory system of benefits for in-

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statutory increase in compensation made effective July 1, 1952. Act of May 23, 1952, 66 Stat. 93, 38 U.S.C. 471a-5. See Appendix B, *infra*, p. 54. In this connection, it should also be noted that even the $49,800 estimate does not take into account the additional 5% increase which will be granted under H. R. 9020, 83d Cong., 2d Sess. That bill "has passed both Houses and is now before the President for signature." Appendix B, *infra*, p. 54. See 100 Cong. Rec. 13332 for table of increased veterans' benefits provided by H. R. 9020.

[17] For a collection of other federal statutes conferring special rights and benefits on veterans, and their dependents, see Kimbrough and Glen, *American Law of Veterans*. For a complete index and digest of benefits conferred by various state

ably with "aris[ing] out of or in the course of military duty", as well as its likening of the veterans' compensation benefits to workmen's compensation benefits (340 U. S. 135, 138, 143, 144, 145, 146), confirm the propriety of defining the term "arising out of or in the course of activity incident to service" in the same manner as "arising out of and in the course of employment" is understood and applied in the field of workmen's compensation.

Less than three months after equating veterans' and workmen's compensation benefits in *Feres*, this Court reiterated the settled principles underlying the test of "arising out of and in the course of employment" in workmen's compensation law. In *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 506-507, the Court stated:

> The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment." § 2 (2), 44 Stat. 1425, 33 U.S.C. § 902 (2). * * * Workmen's compensation is not confined by common-law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 481; *Matter of Waters* v. *Taylor Co.*, 218 N. Y. 248, 251, 112 N. E. 727, 728. *The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Thom* v. *Sinclair* [1917] A. C. 127, 142. *Nor is it necessary that the employee be engaged at the time of the injury in activity*

*of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.* Ibid. * * * [emphasis added].

In other words, "the basic thing" is that an incident of his employment places the claimant in a position where he is surrounded with conditions giving rise to the claim. *Hartford Accident & Indemnity Co.* v. *Cardillo,* 112 F. 2d 11, 14 (C.A. D.C.) (per Mr. Justice Rutledge), certiorari denied, 310 U. S. 649; see also *Leonbruno* v. *Champlain Silk Mills,* 229 N. Y. 470 (per Mr. Justice Cardozo).

That his military service surrounded respondent with the conditions giving rise to the instant claim cannot seriously be challenged. Obviously, it was only because he was in the service and had suffered a disability that he was eligible for admission to the Veterans Administration hospital at which he was injured. His former military service thus surrounded respondent with the precise conditions out of which the claim arose. The claim must therefore be viewed as having "arisen out of or in the course of activity incident to service." In the *O'Neil* case, *supra,* p. 19, Judge Edgerton, rejecting the veteran's claim for additional damages for the post-discharge hospital injuries there involved, observed (202 F. 2d 366, 367):

> Moreover, appellant's service led him to get treatment for his allergy in a government hos-

pital and the treatment he got there caused his disability. Accordingly it may be said that his disability did, though his allergy did not, "arise out of * * * activity incident to service."

The soundness of this conclusion is confirmed by the consistent holdings in workmen's compensation cases throughout the country that, where a work-connected injury is aggravated by negligent medical or surgical treatment, the additional disability resulting from that aggravation is considered as having arisen out of employment to the same extent as the original injury. It is, as one court has pointed out, "clearly the rule, sustained by the great weight of authority, that an injured workman is entitled to have included in any award made him under a workmen's compensation statute, any injury or disability which he may suffer as the result of aggravation, by way of malpractice, of the original injury." *Anderson* v. *Allison*, 12 Wash. 2d 487, 498-499; *Hoover* v. *Globe Indemnity Co.*, 202 N. C. 655; *Ducasse* v. *Walworth Manufacturing Co.*, 1 N. J. Super. 77; *Heaton* v. *Kerlan*, 27 Cal. 2d 716; *Mitchell* v. *Peaslee, Jr.*, 143 Me. 372; *Seaton* v. *United States Rubber Co.*, 223 Ind. 404; *Parchefsky* v. *Kroll Bros.*, 267 N. Y. 410; *Oleszek* v. *Ford Motor Co.*, 217 Mich. 318; *Vatalaro* v. *Thomas*, 262 Mass. 383. [18]

[18] For additional cases sustaining the proposition that "the great majority of American courts now hold that aggravation of the primary injury by medical or surgical treatment is compensable" under the workmen's compensation laws, see Larson, *Workmen's Compensation Law*, Vol. 1, p. 188.

The uniform holding of the cited cases removes any doubt that respondent's hospital injury in the instant case "arose out of or in the course of activity incident to service." The Veterans Administration itself, as we have already pointed out, has adhered to the same view and has repeatedly held "that an additional disability resulting from [medical or surgical] treatment of a directly service-connected disability is to be considered as the proximate result of the service-connected condition and hence adjudicated on the basis that the resultant disability is an aggravation or acceleration of the original condition." Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 110, 112, May 8, 1947; see *supra*, pp. 34-37. Indeed, the express language of Section 31 of the 1934 Act, 38 U.S.C. 501a (*supra*, pp. 2-3) shows that a Veterans Administration hospital aggravation of even a non-service-connected injury must be deemed to be service-connected and for that reason must be compensated "in the same manner" as if such aggravation "were service connected." See *Pettis* v. *United States*, 108 F. Supp. 500, 501 (N.D. Cal.). Respondent's action under the Federal Tort Claims Act is accordingly barred, even if his contention that the bar is operative only where the claim arises out of service-incident injuries is accepted.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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WARREN E. BURGER,
*Assistant Attorney General.*
PAUL A. SWEENEY,
MORTON HOLLANDER,
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JOHN H. KERBY,
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*Of counsel.*

AUGUST 1954

APPENDIX A

## Summary of Veterans' Laws

The most recent compilation of "Laws Relating to Veterans," [19] sets forth the text of over 650 federal statutes enacted from 1914 to 1951. Over 300 of these laws, as noted by the President in his most recent budget message to Congress, "provide a variety of special benefits and services" to veterans and their dependents (H. Doc. 264, 83d Cong., 2d Sess., p. M 50). Compensation and pension payments paid by the Veterans Administration under these laws amounted in the 1953 fiscal year to more than 2.4 billion dollars (*id.* at p. M 51). For the present fiscal year "expenditures of 2.5 billion dollars" are estimated for "compensation and pension benefits" (*id.* at p. M. 52; see also Annual Report of the Administrator of Veterans' Affairs (1952) pp. 186, 203). Current congressional concern for providing an adequate and specialized system of compensation for service-incurred injury or death is further evidenced by the introduction during the fiscal year 1953 of approximately 1,300 bills pertaining to veterans' benefits. [20] This special interest of Congress in veterans' affairs is not, however, a recent phenomenon of the Korean conflict or of World War II but began in the earliest days of our Government.

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[19] Compiled by Superintendent, Document Room, House of Representatives, 1951, 2 vols.

[20] Annual Report of the Administrator of Veterans' Affairs, 1953, p. 110.

The need and desirability of providing specially for disabled Revolutionary Army veterans was stressed early in 1776.[21] Shortly thereafter, the Continental Congress adopted the first national pension law in the United States.[22] This was followed by a long series of other enactments for Revolutionary War veterans and their dependents.[23] The expansion of the military forces as a result of the War of 1812 and the Mexican War was accom-

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[21] Even before the Revolutionary War, the payment of pensions to injured soldiers was a well-established colonial practice. As early as 1624, the Virginia General Assembly passed laws making special provision for "those that shall be hurt upon service," 1 Hening, Stat. at Large for Virginia, 128. Other examples of pension legislation under the Colonial Laws of Massachusetts, Maryland, New York, and Rhode Island are collected in Glasson, *Federal Military Pensions in the United States*, pp. 14-17; see also *Brief History of Legislation Pertaining to Veterans' Benefits*, 38 U.S.C.A., pp. xxvii, xxviii.

[22] Ford, *Journals of the Continental Congress*, vol. 5, pp. 469, 702-705. This Act (Act of August 26, 1776), which was to be administered through the various states, authorized half pay to veterans who had been totally disabled while in the service of the United States. Proportionate relief was authorized for the partially disabled.

[23] Act of September 25, 1778 (*id.*, vol. 12, p. 953); Act of April 23, 1782 (*id.*, vol. 22, p. 210); Act of September 29, 1789, 1st Cong., 1st Sess., 1 Stat. 95; Act of March 23, 1792, 1 Stat. 243; Act of February 28, 1793, 1 Stat. 324; Act of April 25, 1808, 2 Stat. 491. In 1816, an increase in pension rates was suggested, in order to reflect the increased cost of living and to allow veterans to support themselves "plentifully and comfortably." House Report, Committee on Pensions and Revolutionary Claims, American State Papers, Claims, 473-474. The Act of April 24, 1816, 3 Stat. 296, was passed to meet this need. Still additional provisions for veterans were sought in President Monroe's message to Congress in December, 1817. 31 Annals of Congress, 15th Cong., 1st Sess., 1817-1818, vol. 1, p. 19. See also, Act of June 7, 1832, 4 Stat. 529; Act of July 4, 1836, 5 Stat. 127; Act of March 9, 1878, 20 Stat. 27.

panied, as had been true after the Revolutionary War, by the passage of numerous other statutes for compensating injured veterans of those wars.[24] Still additional statutes were passed to compensate veterans of the Civil War and their dependents.[25] And, within six months after the United States entered World War I, the President approved a law establishing a detailed and complete compensation system for those who served in that war, as well as for their dependents.[26] The World War Veterans Act of June 7, 1924 (43 Stat. 607, 38 U.S.C. 421) later consolidated and revised the laws affecting the various benefits available to veterans of World War I and their dependents. Section 213 of the 1924 Act, as noted in the body of the

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[24] Act of April 24, 1816, 3 Stat. 296-297; Act of February 14, 1871, 16 Stat. 411; Act of March 9, 1878, 20 Stat. 27; Act of March 19, 1886, 24 Stat. 5; Act of September 8, 1916, 39 Stat. 844; Act of May 13, 1846, 9 Stat. 9; Act of June 3, 1858, 11 Stat. 309; Sec. 3, Act of July 25, 1886, 14 Stat. 230; Sec. 13, Act of July 27, 1868, 15 Stat. 237; Sec. 18, Act of March 3, 1873, 17 Stat. 572; Act of January 29, 1887, 24 Stat. 371; Act of February 6, 1907, 34 Stat. 879; Act of May 11, 1912, 37 Stat. 112.

[25] Act of July 22, 1861, 12 Stat. 268, 270; Act of July 4, 1864, 13 Stat. 387; Act of June 8, 1872, 17 Stat. 335; Act of March 3, 1865, 13 Stat. 499; Act of June 6, 1866, 14 Stat. 56, 58; Act of March 19, 1886, 24 Stat. 5; Act of April 19, 1908, 35 Stat. 64; Act of June 27, 1890, 26 Stat. 182; Act of April 24, 1906, 34 Stat. 133; Act of March 4, 1907, 34 Stat. 1406; Act of May 11, 1912, 37 Stat. 112.

[26] Act of October 6, 1917, 40 Stat. 398; Act of June 27, 1918, 40 Stat. 617; Act of July 11, 1919, 41 Stat. 158; Act of March 3, 1919, 40 Stat. 1302; Act of August 9, 1921, 42 Stat. 147, 150; Act of April 20, 1922, 42 Stat. 496; Act of May 11, 1922, 42 Stat. 507; Act of July 1, 1922, 42 Stat. 818; Act of June 5, 1924, 43 Stat. 389; Act of December 18, 1922, 42 Stat. 1064; Act of March 4, 1923, 42 Stat. 1521.

brief, expressly authorized compensation for hospitalization injuries.[27] *Supra*, pp. 27-28.

On March 20, 1933, Congress repealed all prior laws granting compensation and other allowances to veterans and their dependents, laid down broad principles for the granting of pensions and other benefits, and gave the President the authority to prescribe by regulation the administrative details (48 Stat. 8, 38 U.S.C. 701). This is the basic law under which payments are now made to veterans and their dependents for World War II service-incurred disability and death. See Veterans' Regulations, 38 U.S.C.A., Chapter 12A. It is also the basic law under which veterans of the Korean conflict are receiving compensation for injury or death suffered during the period of hostilities in Korea (Act of May 11, 1951, 65 Stat. 40, 38 U.S.C. 745).

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[27] The 1924 Act also provided compensation for service-incurred death and disability (43 Stat. 615, 38 U.S.C. 471), for burial allowances (43 Stat. 616, 38 U.S.C. 472), for medical, surgical, and dental treatment in addition to compensation (43 Stat. 618, 38 U.S.C. 479), generous life insurance protection (43 Stat. 624, 38 U.S.C. 511), and a complete program for vocational rehabilitation of the disabled serviceman (43 Stat. 627, 38 U.S.C. 531). Compensation rates for specific disabilities were again increased by the Act of May 5, 1926 (44 Stat. 396) and the Act of February 11, 1927 (44 Stat. 1085).

APPENDIX B

## LETTER FROM THE VETERANS' ADMINISTRATION

VETERANS ADMINISTRATION
Washington 25, D. C.
August 16, 1954

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The Honorable Simon E. Sobeloff
The Solicitor General
Department of Justice
Washington 25, D. C.

Re: United States v. Peter Brown
38 October Term 1954
Supreme Court

DEAR MR. SOLICITOR GENERAL:

The purpose of this letter is to furnish specific information, as requested by the Department, concerning the rates of disability compensation paid to the plaintiff before and after the occurrence of the injury alleged in his complaint.

Prior to entry into the Veterans Administration Hospital, Bronx, New York, on October 1, 1951 Mr. Brown was receiving $15.00 monthly as disability compensation from the Veterans Administration on the basis of a service-connected rating of 10% disability. Subsequent to his discharge from the hospital and effective April 22, 1952 Mr. Brown was rated as having a combined disability rating of 70% and was awarded $119.70 monthly compensation. Effective July 1, 1952 the $119.70

monthly payment was increased to $135.45. 66 Stat. 93, 38 U.S.C. 471 a-5.

Of the $119.70 monthly payment received by Mr. Brown from April 22, 1952 to July 1, 1952, $89.70 per month was paid for and is allocable to the injury sustained by him at the Veterans Administration Hospital and for which injuries his suit under the Federal Tort Claims Act was instituted. Of the $135.45 monthly payment received by Mr. Brown since July 1, 1952 $103.95 represents the portion allocable to his hospital injuries.

To facilitate your computation as to the value of prospective monthly payments to be paid Mr. Brown, I want to point out that he reached his 30th birthday on June 6, 1954. In this connection I also want to point out that under H. R. 9020, which has passed both houses and is now before the President for signature, Mr. Brown's $135.45 monthly payment will be increased to $141.70 of which $108.70 will be paid for his hospitalization injuries.

Very truly yours,

[S] EDWARD E. ODOM,
*General Counsel.*

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